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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN RANDAL CRONK,

Defendant and Appellant.

E046546

(Super.Ct.Nos. SWF015709,
BAF 004876)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge.

Affirmed as modified.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Marvin Randal Cronk pulled a gun on Ben Van Dorien — the man his estranged wife was living with — and threatened to kill him. Later that same night, he

confronted his wife and threatened to kill her if she called the police. About two months later, he grabbed his wife's arms hard enough to leave bruises.

Defendant pleaded guilty to count 4, unlawful possession of a firearm (Pen. Code, § 12021, subd. (c)(1)). A jury then found him guilty as follows:

Count 1: Making a criminal threat (Pen. Code, § 422) against Ben Van Dorian, with a personal firearm use enhancement (Pen. Code, § 12022.5, subd. (a)).

Count 2: Making a criminal threat against Jane Doe.¹

Count 3: Dissuading a witness (Pen. Code, § 136.1, subd. (c)(1)).

Count 5: Assault with a firearm (Pen. Code, § 245, subd. (a)(2)), with a personal firearm use enhancement.

Count 6: Spousal battery (Pen. Code, § 243, subd. (e)(1)).

Defendant was sentenced to a total of 14 years in prison.

Defendant now contends:

1. The trial court abused its discretion by admitting evidence that defendant had committed prior acts of domestic violence.
2. The trial court erred by giving only one of the two self-defense instructions that defendant requested.
3. The imposition of upper terms based on facts not found by a jury beyond a reasonable doubt violated defendant's Sixth Amendment right to trial.

¹ The trial court ordered that defendant's wife be referred to by this fictitious name. (See Pen. Code, § 293.5.)

4. The trial court erred by issuing a restraining order that lasted longer than its criminal jurisdiction.

5. The trial court erred by ordering defendant not to possess any deadly weapon or related paraphernalia.

6. The imposition of separate and unstayed sentences on both count 5 (assault with a firearm) and count 1 (making a criminal threat) violated Penal Code section 654.

We find no error affecting the conviction. We likewise find no error in the imposition of upper terms. The trial court did err, however, by failing to dissolve the restraining order. Moreover, the People concede that the trial court erred by ordering defendant not to possess a deadly weapon; they also concede that the sentence violated Penal Code section 654. We will correct these errors by modifying the judgment.

I

FACTUAL BACKGROUND

A. *Prosecution Evidence.*

Defendant and Jane Doe were married in 2002. They soon began having problems involving “[d]rinking and fighting.” In September 2005, they separated.

1. *Prior domestic violence incidents.*

a. *November 2004.*

In November 2004, during an argument, defendant punched Jane in the face. She fell to the floor. He got on top of her. She fought back, “flailing [her] arms [and] kicking.” Defendant grabbed her by the shoulders and started “throwing [her] body

against the ground” Her head hit the ground, and she passed out. She was left with a black eye, as well as torn ligaments in one arm that prevented her from raising it higher than her shoulder for six months.

As a result of this incident, in December 2004, defendant pleaded guilty to misdemeanor spousal battery.

b. *June 2005.*

In June 2005, defendant came home drunk and angry. He and Jane got into an argument. Then he started “us[ing her] as . . . a baseball bat . . . throwing [her] against the wall, throwing [her] against the bed.” The metal bed frame was bent beyond repair. Jane sustained bruises on her back and legs.

c. *August 2005.*

In August 2005, during another argument, defendant threw a beer bottle at Jane. It hit her in the right side, leaving bruises on her breast and arm.

d. *October 2005.*

In October 2005, after the separation, Jane went to defendant’s house to get some clothes. While she was there, defendant came home. She said, “Stay away from me. I’m just getting some stuff, and I’m leaving.” Defendant replied, “No, you’re not.” He threw her on the bed and started slapping her and punching her in the face. She was left with a bruise above one eye.

e. *November 2005.*

After defendant filed for divorce, Jane collected all of the “things that were really special to [her]” into one room in defendant’s house. One day in November 2005, she returned and found that everything in the room had been destroyed, including over \$8,000 worth of her clothes.

2. *March 14, 2006: Counts 1-5.*

a. *First confrontation: At Van Dorian’s house.*

In late October 2005, Jane started dating Ben Van Dorian. Around December 2005, she moved into Van Dorian’s home in Hemet. She did not tell defendant that she was living there; however, she did tell a mutual acquaintance.

On March 14, 2006, around 6:45 p.m., Jane and Van Dorian were at home when they saw the light from a cell phone or a camera outside a window. They realized that defendant was in their back yard. Jane called the police.

Van Dorian was angry and upset. He ran outside and intercepted defendant in the front yard. According to Van Dorian, defendant “came straight toward [him].”

Defendant grabbed his shirt collar and threw a punch at him. Van Dorian blocked the punch and started punching defendant in the head and stomach. Defendant did not hit back. Defendant kept asking why his wife was in Van Dorian’s house. In response, Van Dorian kept asking why defendant was on his property.

Suddenly, defendant reached “for the back of his belt,” pulled out a small revolver, and pressed it against Van Dorian’s head. Defendant said, “I’m going to kill you, then

[Jane], and then myself[.]” Van Dorian “feared for [his] life.” He “became extremely humble and basically talked [defendant] down.” Defendant put down the gun, ran to his car, and drove away. As he was leaving, defendant said, “This is not over and I will be back.”

Van Dorian relayed defendant’s threat to Jane. When the police responded, Van Dorian appeared “afraid, angry, and distraught.” Jane, too, was upset; she was shaking and crying and could hardly talk.

b. *Second confrontation: At the O.K. Corral.*

Later that same night, Van Dorian and Jane went to the O.K. Corral, a restaurant and bar that they co-owned. Jane was afraid that defendant “would be looking for [her],” but she felt she had to go to orient a new karaoke disk jockey who was starting that night.

After arriving, Jane went outside to smoke. Defendant came walking up. Jane told him to go home. He replied, “Nobody is going home tonight.” He added, “I just want to talk and if you call the police, I’m going to kill you.”

Jane was afraid. She thought defendant was going to hurt her. He had threatened her before; in September 2005, he had called her names and said that “if [she] didn’t watch out, he was going to destroy [her].” Jane walked back into the building, but defendant followed her. She hid in the men’s restroom.

Van Dorian saw defendant come in, sit at the bar, and order a beer. He immediately called the police. After defendant got the beer, “he was constantly walking around, eyeballing [Van Dorian].”

Multiple police officers arrived in response to the call. One of them walked up behind defendant and grabbed his arms. Defendant resisted, thrashing and yelling. After he was handcuffed, the police found a fully loaded .38-caliber revolver tucked into the back of his waistband.

Later, an officer had to move defendant from one patrol car to another. Defendant struggled, throwing his head around and trying to kick the officer. During the struggle, defendant said, “Give me the gun and I’ll [p]ut a bullet in the bitch’s head.” He added, “That fuckin’ bitch is doing another guy and I’m going to kill them both.”

Defendant admitted “that he knew that they would be there at that bar and that’s why he went there.”

3. *May 8, 2006: Count 6.*

On May 10, 2006, Jane reported to the police that, two days earlier, on May 8, 2006, defendant had come to her office to give her some keys. While he was there, he grabbed her upper arm so hard that he left bruises. At the time of trial, however, Jane could not clearly remember this incident.

B. *Defense Evidence.*

Jane was impeached with a prior felony conviction for driving under the influence.

Van Dorien was impeached with an unspecified prior felony conviction.

Defendant admitted that in November 2004, during an argument, he slapped Jane. It was meant to be just “a fingertip slap to sting,” but Jane “flinched into the slap” She started trying to hit and kick him. He tried to wrap his arms and legs around her, and

they both fell to the floor. “The only thing [he] could think to do was to . . . repeatedly slam [their] bodies against the floor until she quit fighting [him].”

Defendant denied hitting or injuring Jane at any other time. He did admit “cut[ting] the crotch out of her pants and panties,” because she was cheating.

In February 2006, defendant heard that Jane was living with Van Dorian. On March 14, 2006, he was looking for her, to ask her to come home. He went to the house and rang the bell; no one answered.

Defendant went to the O.K. Corral, where he had four beers, then returned to the house. He rang the bell again; when there was no answer, he went into the back yard. He looked in a window and saw Jane in her underwear. At that point, he realized that their marriage was over. He took a picture of her, using his cell phone, as “evidence.”

As he was doing so, he saw Van Dorian; he realized that Van Dorian had seen him. He headed toward his car, but Van Dorian came out and “cut [him] off.” Van Dorian kept asking, “What are you doing on my property?” Defendant kept responding, “Trying to find out what you’re doing with my wife.” Van Dorian “lunged” at defendant and tried to hit him, but defendant leaned back, so that Van Dorian only scratched his neck. Defendant put his hand behind his back and said, “Don’t even go there[,] mother fucker.” He then backed away, got in his car, and left. Defendant denied having a gun or making any threats.

Defendant went home, where he drank seven shots of Kool-Aid and vodka,² followed by a beer. At that point, he got his gun from his bedroom, intending to kill himself, but he could not pull the trigger.

Defendant decided to go to the O.K. Corral for karaoke. He did not remember driving there. He did not realize that he still had his gun. He did not remember seeing Jane outside. He remembered greeting the karaoke disk jockey. The next thing he knew, police officers were grabbing his arms. He did not remember saying anything to the police (other than “[f]uck you”).

Defendant claimed that Jane continued to come over to his house; they had sex several times in April, May, and July. Defendant denied touching Jane at all between May 7 and May 10 or having any dispute with her over keys. She told him later that she did not know how she had gotten the bruises in May, but “she was sure that [he] didn’t do it.”

II

EVIDENCE OF PRIOR ACTS OF DOMESTIC VIOLENCE

Defendant contends that the trial court abused its discretion by admitting the evidence that he had committed prior acts of domestic violence.

² Defendant testified that these were supposed to be Jell-O shots, but he accidentally made them with Kool-Aid instead, “[s]o they weren’t Jello’d up and they were very cold and they went down easy”

A. *Additional Factual and Procedural Background.*

In its trial brief, the prosecution argued that it should be allowed to introduce evidence that defendant had committed five specified prior acts of domestic violence (see part I.A.1.a-e, *ante*) against Jane Doe, under Evidence Code section 1109. Defense counsel objected that the evidence was more prejudicial than probative under Evidence Code section 352. The trial court overruled the objection and admitted the evidence.

The prosecution's trial brief had not mentioned defendant's September 2005 threat to "destroy" Jane. (See part I.A.2.b, *ante*.) When this threat was introduced at trial, however, defense counsel objected based on Evidence Code sections 1109 and 352. The trial court overruled the objection.

Later, the trial court instructed the jury with regard to evidence of uncharged domestic violence: "[Y]ou may, but are not required to, conclude from th[is] evidence that the defendant was disposed or inclined to commit domestic violence." (Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 852.)

B. *Analysis.*

Evidence Code section 1109, subdivision (a)(1), as relevant here, provides: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its

admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice”

“By reason of section 110[9], trial courts may no longer deem ‘propensity’ evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than admit or exclude every [domestic violence] offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other [domestic violence] offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]” (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 [actually discussing analogous statute allowing evidence of propensity to commit sex offenses, Evid. Code, § 1108].)

“Like any ruling under section 352, the trial court’s ruling admitting evidence under section 110[9] is subject to review for abuse of discretion. [Citations.]” (*People v. Story* (2009) 45 Cal.4th 1282, 1295 [actually discussing Evid. Code, § 1108].) “Under the abuse of discretion standard, “a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an

arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.]’ [Citations.]” (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

Evidence that defendant had a propensity to commit acts of domestic violence against his wife was substantially probative. ““In the determination of probabilities of guilt, evidence of character is relevant. [Citations.]’ [Citation.] Indeed, the rationale for excluding such evidence is not that it lacks probative value, but that it is too relevant.” (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179.) Here, the prior incidents showed that defendant had a propensity to use physical force whenever he was mad at Jane. Moreover, they tended to show that, even if defendant was intoxicated, as he testified, he did not lack the specific intent to threaten. The prior incidents were additionally relevant to show that defendant’s current threats caused Jane “reasonably to be in sustained fear,” as Penal Code section 422 requires.

Defendant argues that the prior incidents were not similar to the charged crimes. They were all sufficiently similar, however, because they involved the same victim. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026 [“[e]ven before the enactment of section 1109, the case law held that an uncharged act of domestic violence committed by the same perpetrator against the same victim is admissible”] [Fourth Dist., Div. Two].) Defendant argues that they only tended to show that he used violence during arguments, and thus they were not relevant to whether he would use violence out of jealousy. The jury, however, could reason that finding one’s wife (even one’s estranged wife) with another man is far more stressful than an ordinary argument. Thus, if defendant had a

propensity to use violence during an argument, then a fortiori, he had a propensity to use violence when he found his wife with another man.

On the other hand, the evidence was not particularly prejudicial. “. . . ‘The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” [Citation.]’ [Citation.]” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

The evidence here was “prejudicial” only in the sense that it was relevant and probative propensity evidence. It was not particularly inflammatory; in the prior incidents, Jane sustained only bruises, property damage, and in one instance torn ligaments. The prior incidents were not remote; they all occurred within about six months before the charged domestic violence. Nor did they consume an undue amount of time.

We therefore conclude that the trial court did not abuse its discretion by admitting the prior domestic violence incidents.

III

REFUSAL OF A REQUESTED SELF-DEFENSE INSTRUCTION

Defendant contends that the trial court erred by giving inadequate instructions on self-defense.

A. *Additional Factual and Procedural Background.*

In connection with count 5 (assault with a deadly weapon), the trial court instructed that the People had to prove, among other things, that “[t]he defendant did not act in self[-]defense.” (CALCRIM No. 875.)

Defense counsel requested both CALCRIM No. 3470 (Right to Self-Defense or Defense of Another (Non-Homicide)) and CALCRIM No. 3471 (Right to Self-Defense: Mutual Combat or Initial Aggressor).

CALCRIM No. 3470, as relevant here, would have stated:

“Self-defense is a defense to _____ <insert list of pertinent crimes charged>. The defendant is not guilty of (that/those crimes) if (he/she) used force against the other person in lawful (self-defense/ or defense of another). The defendant acted in lawful (self-defense/ or defense of another) if:

“1 The defendant reasonably believed that (he/she/ or someone else/ or _____ <insert name of third party>) was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;

“2 The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

“AND

“3 The defendant used no more force than was reasonably necessary to defend against that danger.

“Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/ or someone else). Defendant’s belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ or defense of another).

“When deciding whether the defendant’s beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant’s beliefs were reasonable, the danger does not need to have actually existed. [¶] . . . [¶]

“A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/ _____ <insert crime>) has passed. This is so even if safety could have been achieved by retreating.

“The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ or defense of another). If the People have

not met this burden, you must find the defendant not guilty of _____ <insert crime(s) charged>.”

CALCRIM No. 3471, as actually given, stated:

“A person who engages in mutual combat or who is the first one to use physical force has a right to self-defense only if,

“1. He actually, and in good faith, tries to stop fighting, and

“2. He indicates by word or by conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting and that he has stopped fighting.

“If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight.

“If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting.”

The prosecutor agreed that CALCRIM No. 3471 could be given. However, she objected to CALCRIM No. 3470. She argued that there was insufficient evidence of self-defense because, according to defendant’s own testimony, Van Dorien tried to hit him, and he never tried to hit Van Dorien.

The trial court agreed with the prosecutor’s position. Accordingly, it gave CALCRIM No. 3471, but it refused to give CALCRIM No. 3470.

B. *Analysis.*

“A trial court is required to instruct sua sponte on any defense, including self-defense, only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant’s theory of the case. [Citation.]” (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.)

Here, if Van Dorien’s testimony is believed, defendant was the initial aggressor — he threw the first punch. Moreover, when defendant did so, he had no reason to believe that he was in danger. On this view of the facts, he could not claim self-defense except under the circumstances outlined in CALCRIM No. 3471. Thus, there was no need to give CALCRIM No. 3470.

Admittedly, if defendant’s testimony is believed, Van Dorien was the initial aggressor — he lunged at defendant and scratched his neck. Defendant, however, denied using any force whatsoever in response. To the contrary, he testified that he put his right hand behind his back, said “Don’t even go there[,] mother fucker,” and backed away. He denied having a gun. He also denied making any threats to Van Dorien. Even assuming that his ambiguous gesture toward his back could be viewed as an attempt to make Van Dorien *think* he had a gun, it was not an assault, because defendant denied having the present ability to shoot. (See Pen. Code, § 240.) Thus, this was not evidence that he committed a crime in self-defense; it was evidence that he did not commit a crime at all. (Cf. *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357-1360 [defendant was not entitled

to instructions on self-defense where he testified that gun went off accidentally] [Fourth Dist., Div. Two].)

Defendant also complains about the provision of CALCRIM No. 3471 that he had the right to use deadly force if, and only if, Van Dorian “responded with such sudden and deadly force that the defendant could not withdraw from the fight” He argues that this prevented the jury from finding that it was reasonable for him to use deadly force even if he could (or did) withdraw. This, however, is not a separate argument. It assumes that Van Dorian was the initial aggressor, and therefore defendant had the right to stand his ground. As already discussed, however, the evidence showed that defendant either was the initial aggressor or did not commit any assault at all. Under these circumstances, CALCRIM No. 3471 correctly informed the jury that defendant did not have the right to use deadly force unless he was prevented from withdrawing.

Defendant argues that he was entitled to instructions on self-defense, not only in connection with assault (count 5), but also in connection with making criminal threats (counts 1 and 2). It does not appear, however, that he was relying on such a defense. The version of CALCRIM No. 3470 that defense counsel requested applied strictly to the “use of force” in self-defense. He did not request any instruction on the use of threats in self-defense. Moreover, as already noted, defendant denied making any threats. Thus, this defense was inconsistent with defendant’s theory of the case.

Finally, defendant argues that, in the absence of CALCRIM No. 3470, the jury was never told that the prosecution had the burden of disproving self-defense beyond a

reasonable doubt. CALCRIM No. 875, however, regarding assault with a deadly weapon, stated that the prosecution had the burden of proving that defendant did not act in self-defense. More generally, CALCRIM No. 220 stated that the prosecution had the burden of proving defendant guilty beyond a reasonable doubt. Accordingly, the instructions, taken as a whole, communicated this principle adequately.

IV

CUNNINGHAM

Defendant contends that the imposition of upper terms based on facts not found by a jury beyond a reasonable doubt violated his Sixth Amendment right to trial.

A. Additional Factual and Procedural Background.

The trial court selected count 5 (assault with a firearm) as the principal term. On this count, it sentenced defendant to four years, the upper term, based on the following aggravating factors:

1. The crime involved great violence, great bodily harm, threat of great bodily harm, and other acts disclosing a high degree of cruelty, viciousness, or callousness (Cal. Rules of Court, rule 4.421(a)(1));
2. Defendant was armed with a weapon (Cal. Rules of Court, rule 4.421(a)(2));
3. The manner in which the crime was carried out indicated planning and sophistication (Cal. Rules of Court, rule 4.421(a)(8));
4. Defendant took advantage of a position of trust or confidence (Cal. Rules of Court, rule 4.421(a)(11));

5. Defendant had engaged in violent conduct that indicated a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1));
6. Defendant was on probation (Cal. Rules of Court, rule 4.421(b)(4)); and
7. Defendant's prior performance on probation or parole was unsatisfactory (Cal. Rules of Court, rule 4.421(b)(5)).

On the personal firearm use enhancement to count 5, it sentenced defendant to 10 years, likewise the upper term, based on its finding that the manner in which the crime was carried out indicated planning, sophistication, or professionalism (Cal. Rules of Court, rule 4.421(a)(8)).

B. *Analysis.*

“Other than a prior conviction, [citation] . . . ‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ [Citations.]” (*Cunningham v. California* (2007) 549 U.S. 270, 282 [127 S.Ct. 856, 166 L.Ed.2d 856].) “[T]he relevant ‘statutory maximum[.]’ . . . is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.’ [Citation.]” (*Id.* at p. 275.)

Under Penal Code section 1170, subdivision (b), as it stood through 2007, whenever a statute provided for a lower, a middle, and an upper term, the trial court was required to impose the middle term unless it found aggravating or mitigating circumstances. (Former Pen. Code, § 1170, subd. (b), Stats. 2004, ch. 747, § 1.) For this reason, “the middle term . . . , not the upper term, [wa]s the relevant statutory maximum.

[Citation.]” (*Cunningham v. California, supra*, 549 U.S. at p. 288; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 852-853.)

Penal Code section 1170, subdivision (b), however, was amended effective January 1, 2008. (Stats. 2007, ch. 740, § 1.) As a result, by the time defendant was sentenced, it provided (as it still provides) that “the choice of the appropriate term shall rest within the sound discretion of the court.” This amendment “cure[d] the constitutional defect in the statute” and permitted the trial court to impose an upper term sentence based on facts not found by a jury beyond a reasonable doubt. (*People v. Sandoval, supra*, 41 Cal.4th at p. 844.) Moreover, the amendment can be applied to crimes committed before it went into effect; this does not violate ex post facto or due process principles. (*Id.* at pp. 853-857.)

We therefore conclude that the trial court did not err by imposing upper terms based on facts not found by the jury beyond a reasonable doubt.

V

OTHER SENTENCING ERRORS

Defendant contends that the trial court made the following three sentencing errors.

A. *Restraining Order Effective After Judgment.*

Defendant contends that the trial court erroneously issued a restraining order that lasted longer than its jurisdiction in this case.

Before trial, the trial court issued a domestic violence restraining order pursuant to Penal Code section 136.2. The order, by its terms, was effective until December 26, 2012. At sentencing, the trial court did nothing to terminate the restraining order.

Preliminarily, we questioned whether defendant could even raise this issue. It is arguable that the restraining order was immediately appealable. (See Code Civ. Proc., § 904.1, subd. (a)(6); *In re Cassandra B.* (2004) 125 Cal.App.4th 199, 207-209.) If so, then any error in the restraining order itself was forfeited by defendant's failure to file a timely appeal.

Defendant is not really claiming, however, that the restraining order was erroneous when issued. Although it did purport to be effective until December 26, 2012, it was possible (if unlikely) that the criminal proceeding could have lasted that long. Rather, defendant is essentially complaining that the trial court failed to dissolve the restraining order upon entry of judgment. That issue is properly presented in this appeal. (Pen. Code, § 1237 [defendant may appeal from judgment of conviction]; see also Code Civ. Proc., § 904.1, subd. (a)(6) [refusal to dissolve injunction is appealable].)

We turn, therefore, to the merits.

A restraining order issued under Penal Code section 136.2 is “operative only during the pendency of the criminal proceedings and as [a] prejudgment order[.]. [Citation.]” (*People v. Selga* (2008) 162 Cal.App.4th 113, 119; accord, *People v. Stone* (2004) 123 Cal.App.4th 153, 159-160.) The People concede the error. Accordingly, in our disposition, we will dissolve the restraining order.

B. *Order Prohibiting Possession of a Firearm, a Deadly Weapon, or Related Paraphernalia.*

At sentencing, the trial court “ordered” defendant not to possess “any firearm or deadly weapon or related paraphernalia for life” Our research has not revealed any statutory authority for this order. Admittedly, the court was required to give defendant written notice that he was prohibited from possessing a firearm. (Pen. Code, § 12021, subd. (d)(2).) However, this order went beyond a mere advisal; it exposed defendant to additional punishment by way of contempt. It was also overbroad, as defendant was not statutorily prohibited from possessing deadly weapons in general (see Pen. Code, § 12020) or any “paraphernalia” other than ammunition. (See Pen. Code, § 12316, subd. (b).) Accordingly, we will strike this provision of the judgment.

C. *Multiple Punishment on Both Count 1 and Count 5.*

The trial court erroneously imposed separate and unstayed sentences on both count 1 (making a criminal threat against Van Dorien) and count 5 (aggravated assault). (Pen. Code, § 654; see *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1345-1346 [Pen. Code, § 654 barred multiple punishment for both dissuading a witness and making a criminal threat].) The People concede the error. We will modify the judgment accordingly.

VI

DISPOSITION

The pretrial restraining order is dissolved. (See part V.A, *ante.*)

The provision of the judgment that “defendant is ordered not to own, possess, or have under his control any firearm or deadly weapon or related paraphernalia for life” is stricken. (See part V.B, *ante.*)

Execution of the two-year concurrent term imposed on count 1 (making a criminal threat against Van Dorian) is stayed. (See part V.C, *ante.*) This stay will become permanent upon defendant’s service of the rest of his sentence.

The judgment, as thus modified, is affirmed. The trial court is directed to amend the sentencing minute order and the abstract of judgment and to forward a certified copy of the amended abstract to the Director of the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

KING
J.